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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 KIM A.W.S., ) NO. CV 18-6415-E  
12 )  
13 Plaintiff, )  
14 )  
15 v. ) MEMORANDUM OPINION  
16 )  
17 NANCY A. BERRYHILL, DEPUTY )  
18 COMMISSIONER FOR OPERATIONS, )  
19 SOCIAL SECURITY, )  
20 )  
21 Defendant. )  
22 )  
23 )  
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18 PROCEEDINGS

19  
20 Plaintiff filed a complaint on July 25, 2018, seeking review of  
21 the Commissioner's denial of benefits. The parties consented to  
22 proceed before a United States Magistrate Judge on August 20, 2018.  
23 Plaintiff filed a motion for summary judgment on January 11, 2019.  
24 Defendant filed a motion for summary judgment on February 11, 2019.  
25 The Court has taken the motions under submission without oral  
26 argument. See L.R. 7-15; "Order," filed July 30, 2018.

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**BACKGROUND**

In 2008, when Plaintiff was working in retail sales, Plaintiff injured her left knee, and perhaps also her back, when she jumped down three or four feet from a stuck elevator (Administrative Record ("A.R.") 262)). Plaintiff apparently resumed working part time in retail sales in March of 2009, but "did not engage in any substantial gainful activity" after January 24, 2010, and was fired in October of 2010 (A.R. 49-50, 66, 141, 149). In 2011 and 2012, Plaintiff sought other retail jobs without success (A.R. 64-65, 238, 240, 258-59).

In 2015, Plaintiff filed an application for disability insurance benefits, alleging she had been disabled since January 24, 2010 (A.R. 136). Plaintiff's last insured date was December 31, 2014 (A.R. 49, 61).

An Administrative Law Judge ("ALJ") reviewed the record and heard testimony from Plaintiff and a vocational expert (A.R. 47-389). The ALJ found that, prior to December 31, 2014, Plaintiff had severe "chronic low back pain [and] status post left knee arthroscopic surgery," but retained the residual functional capacity to perform certain light work, including Plaintiff's past relevant work as generally performed (A.R. 49-53; see also A.R. 74-75 (vocational expert's testimony, which the ALJ adopted)). The Appeals Council denied review (A.R. 1-3).

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If the evidence can support either outcome, the court may not substitute its judgment for that of the ALJ. But the Commissioner's decision cannot be affirmed simply by isolating a specific quantum of supporting evidence. Rather, a court must consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [administrative] conclusion.

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## DISCUSSION

After consideration of the record as a whole, Defendant's motion is granted and Plaintiff's motion is denied. The Administration's findings are supported by substantial evidence and are free from material<sup>1</sup> legal error. Plaintiff's contrary arguments are unavailing.

### **I. Substantial Evidence Supports the Conclusion Plaintiff Could Work Prior to December 31, 2014.**

A social security claimant bears the burden of "showing that a physical or mental impairment prevents [her] from engaging in any of [her] previous occupations." Sanchez v. Secretary, 812 F.2d 509, 511 (9th Cir. 1987); accord Bowen v. Yuckert, 482 U.S. 137, 146 n.5 (1987). Plaintiff must prove her impairments prevented her from working for twelve continuous months. See Krumpelman v. Heckler, 767 F.2d 586, 589 (9th Cir. 1985), cert. denied, 475 U.S. 1025 (1986). Plaintiff also must prove that she became disabled prior to the expiration of her insured status. See 42 U.S.C. § 416(i)(2)(C), 416(i)(3)(A); 20 C.F.R. 404.131; see also Vertigan v. Halter, 260 F.3d 1044, 1047 (9th Cir. 2001); Flaten v. Secretary of Health and Human Services, 44 F.3d 1453, 1458 (9th Cir. 1995) (where claimants apply for benefits after the expiration of their insured status based on a current disability, the claimants "must show that the current

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<sup>1</sup> The harmless error rule applies to the review of administrative decisions regarding disability. See Garcia v. Commissioner, 768 F.3d 925, 932-33 (9th Cir. 2014); McLeod v. Astrue, 640 F.3d 881, 886-88 (9th Cir. 2011).

1 disability has existed continuously since some time on or before the  
2 date their insured status lapsed").

3  
4 Substantial evidence supports the conclusion that Plaintiff  
5 failed to carry her burden in this case. The Administrative Record  
6 contains relevant evidence that "a reasonable mind might accept as  
7 adequate to support [the] conclusion" that Plaintiff was not disabled  
8 prior to December 31, 2014. See Richardson v. Perales, 402 U.S. at  
9 401 (9th Cir. 2006).

10  
11 Dr. Phillip A. Sobol, a treating orthopedic surgeon, opined that  
12 Plaintiff could have stayed on her feet for seven hours during an  
13 eight hour work day (A.R. 271). Dr. Sobol believed Plaintiff to have  
14 been precluded from only heavy lifting and certain postural activities  
15 (A.R. 270-71). The functional capacity Dr. Sobol believed Plaintiff  
16 possessed considerably exceeded the capacity claimed by Plaintiff and  
17 was very similar to (although not identical with) the capacity the ALJ  
18 found to have existed (A.R. 50, 68-70, 270-71). A treating  
19 physician's opinion "is generally afforded the greatest weight in  
20 disability cases. . . ." Tonapetyan v. Halter, 242 F.3d 1144, 1149  
21 (9th Cir. 1991).

22  
23 Dr. Azizollah Karamlou, a consultative examining internist,  
24 opined that Plaintiff retained essentially the same residual  
25 functional capacity the ALJ found to have existed (A.R. 325-26). This  
26 opinion furnishes substantial evidence supporting the conclusion  
27 Plaintiff could work. See Orn v. Astrue, 495 F.3d 625, 631-32 (9th  
28 Cir. 2007) (examining physician's opinion based on independent

1 clinical findings constitutes substantial evidence to support a non-  
2 disability determination); Tonapetyan v. Halter, 242 F.3d at 1149  
3 (same).

4  
5 Non-examining state agency physicians also opined Plaintiff had a  
6 residual functional capacity essentially equivalent to the capacity  
7 the ALJ found to have existed (A.R. 82-87). These non-examining  
8 physicians' opinions lend additional support to the ALJ's findings.  
9 See Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995) (where the  
10 opinions of non-examining physicians do not contradict "all other  
11 evidence in the record" an ALJ properly may rely on these opinions);  
12 Curry v. Sullivan, 925 F.2d 1127, 1130 n.2 (9th Cir. 1990).

13  
14 The vocational expert testified that a person with the residual  
15 functional capacity the ALJ found to have existed could perform  
16 Plaintiff's past relevant work as generally performed (A.R. 74-75).  
17 This testimony furnishes substantial evidence that there existed  
18 significant numbers of jobs Plaintiff could have performed. See  
19 Barker v. Secretary, 882 F.2d 1474, 1478-80 (9th Cir. 1989); Martinez  
20 v. Heckler, 807 F.2d 771, 775 (9th Cir. 1986); see generally Johnson  
21 v. Shalala, 60 F.3d 1428, 1435-36 (9th Cir. 1995) (ALJ properly may  
22 rely on vocational expert to identify jobs claimant can perform); 42  
23 U.S.C. § 423(d)(2)(A); 20 C.F.R. §§ 404.1520, 416.920; see also Lewis  
24 v. Barnhart, 281 F.3d 1081, 1083 (9th Cir. 2002) (a claimant is not  
25 disabled if she can perform her past relevant work as she actually  
26 performed it or as such work is generally performed).

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1 To the extent the evidence of record is conflicting, the ALJ  
2 properly resolved the conflicts. See Treichler v. Commissioner, 775  
3 F.3d 1090, 1098 (9th Cir. 2014) (court "leaves it to the ALJ" to  
4 resolve conflicts and ambiguities in the record). The Court must  
5 uphold the administrative decision when the evidence "is susceptible  
6 to more than one rational interpretation." Andrews v. Shalala, 53  
7 F.3d at 1039-40. The Court will uphold the ALJ's rational  
8 interpretation of the evidence in the present case notwithstanding any  
9 conflicts in the record.

10  
11 **II. The ALJ did not Materially Err in Discounting Plaintiff's**  
12 **Subjective Complaints.**  
13

14 Plaintiff testified to subjective pain of allegedly disabling  
15 severity (A.R. 63-64, 68-70). For example, she described her back  
16 pains as "constant," "stabbing, sharp pains" from "top to bottom"  
17 (A.R. 63). Plaintiff challenges the legal sufficiency of the ALJ's  
18 stated reasons for discounting Plaintiff's subjective complaints. The  
19 Court discerns no material error.

20  
21 An ALJ's assessment of a claimant's credibility is entitled to  
22 "great weight." Anderson v. Sullivan, 914 F.2d 1121, 1124 (9th Cir.  
23 1990); Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1985). Where, as  
24 here, an ALJ finds that the claimant's medically determinable  
25 impairments reasonably could be expected to cause some degree of the  
26 alleged symptoms of which the claimant subjectively complains, any  
27 discounting of the claimant's complaints must be supported by  
28 specific, cogent findings. See Berry v. Astrue, 622 F.3d 1228, 1234

(9th Cir. 2010); Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995);  
but see Smolen v. Chater, 80 F.3d 1273, 1282-84 (9th Cir. 1996)  
(indicating that ALJ must offer "specific, clear and convincing"  
reasons to reject a claimant's testimony where there is no evidence of  
"malingering").<sup>2</sup> An ALJ's credibility finding "must be sufficiently  
specific to allow a reviewing court to conclude the ALJ rejected the  
claimant's testimony on permissible grounds and did not arbitrarily  
discredit the claimant's testimony." See Moisa v. Barnhart, 367 F.3d  
882, 885 (9th Cir. 2004) (internal citations and quotations omitted);  
see also Social Security Ruling ("SSR") 96-7p (explaining how to  
assess a claimant's credibility), superseded, SSR 16-3p (eff. Mar. 28,  
2016).<sup>3</sup> As discussed below, the ALJ stated sufficient reasons for  
finding Plaintiff's subjective complaints less than fully credible.

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<sup>2</sup> In the absence of an ALJ's reliance on evidence of  
"malingering," most recent Ninth Circuit cases have applied the  
"clear and convincing" standard. See, e.g., Leon v. Berryhill,  
880 F.3d 1041, 1046 (9th Cir. 2017); Brown-Hunter v. Colvin, 806  
F.3d 487, 488-89 (9th Cir. 2015); Burrell v. Colvin, 775 F.3d  
1133, 1136-37 (9th Cir. 2014); Treichler v. Commissioner, 775  
F.3d at 1102; Ghanim v. Colvin, 763 F.3d 1154, 1163 n.9 (9th Cir.  
2014); Garrison v. Colvin, 759 F.3d 995, 1014-15 & n.18 (9th Cir.  
2014); see also Ballard v. Apfel, 2000 WL 1899797, at \*2 n.1  
(C.D. Cal. Dec. 19, 2000) (collecting earlier cases). In the  
present case, the ALJ's findings are sufficient under either  
standard, so the distinction between the two standards (if any)  
is academic.

<sup>3</sup> The appropriate analysis under the superseding SSR is  
substantially the same as the analysis under the superseded SSR.  
See R.P. v. Colvin, 2016 WL 7042259, at \*9 n.7 (E.D. Cal. Dec. 5,  
2016) (stating that SSR 16-3p "implemented a change in diction  
rather than substance") (citations omitted); see also Trevizo v.  
Berryhill, 871 F.3d 664, 678 n.5 (9th Cir. 2017) (suggesting that  
SSR 16-3p "makes clear what our precedent already required").



1       The ALJ stressed that, in numerous respects, the objective  
2 medical evidence failed to support the claimed severity of Plaintiff's  
3 subjective symptoms (A.R. 51-53). An ALJ permissibly may rely in part  
4 on a lack of supporting objective medical evidence in discounting a  
5 claimant's allegations of disabling symptomology. See Burch v.  
6 Barnhart, 400 F.3d 676, 681 (2005) ("Although lack of medical evidence  
7 cannot form the sole basis for discounting pain testimony, it is a  
8 factor the ALJ can consider in his [or her] credibility analysis.");  
9 Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001) (same); see  
10 also Carmickle v. Commissioner, 533 F.3d 1155, 1161 (9th Cir. 2008)  
11 ("Contradiction with the medical record is a sufficient basis for  
12 rejecting the claimant's subjective testimony"); Parra v. Astrue, 481  
13 F.3d 742, 750 (9th Cir. 2007), cert. denied, 552 U.S. 1141 (2008)  
14 (subjective knee pain properly discounted where laboratory tests  
15 showed knee function within normal limits); SSR 16-3p ("[O]bjective  
16 medical evidence is a useful indicator to help make reasonable  
17 conclusions about the intensity and persistence of symptoms, including  
18 the effects those symptoms may have on the ability to perform  
19 work-related activities . . ."). Although inconsistencies between  
20 subjective symptom complaints and objective medical evidence cannot be  
21 the sole basis for discounting a claimant's complaints, Burch v.  
22 Barnhart, 400 F.3d at 681, the ALJ did not discount Plaintiff's  
23 complaints solely on the basis that the complaints were inconsistent  
24 with the objective medical evidence.

25  
26       As the ALJ also pointed out, there were lengthy periods of time  
27 during which Plaintiff sought no medical treatment for her allegedly  
28 disabling pain (A.R. 51-52). An unexplained failure to seek frequent

1 medical treatment may discredit a claimant's allegations of disabling  
2 symptoms. See Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012);  
3 Burch v. Barnhart, 400 F.3d at 681; Batson v. Commissioner, 359 F.3d  
4 1190, 1196 (9th Cir. 2004); Johnson v. Shalala, 60 F.3d at 1434;  
5 accord Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991); Fair v.  
6 Bowen, 885 F.2d 597, 603-604 (9th Cir. 1989); see also Chavez v.  
7 Department of Health and Human Serv., 103 F.3d 849, 853 (9th Cir.  
8 1996) (failure to seek "further treatment" for back injury among  
9 specific findings justifying rejection of claimant's excess pain  
10 testimony).<sup>4</sup>

11  
12 The ALJ also noted that, on numerous occasions before and during  
13 the period of alleged disability, Plaintiff had declined refills of  
14 prescription pain medication (A.R. 52, 218, 226, 235, 244, 245).  
15 Noncompliance with prescribed or recommended treatment can properly  
16 suggest that a claimant's symptoms have not been as severe as the  
17 claimant has asserted. See Fair v. Bowen, 885 F.2d at 603  
18 (unexplained or inadequately explained failure to follow prescribed  
19 course of treatment can cast doubt on claimant's credibility); see  
20 also Molina v. Astrue, 674 F.3d at 1113 ("We have long held that, in  
21 assessing a claimant's credibility the ALJ may properly rely on  
22 unexplained or inadequately explained failure . . . to follow a

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23  
24 <sup>4</sup> Plaintiff attempted to explain the paucity of her  
25 treatment by saying she had been busy taking her mother and  
26 daughter to medical appointments and by saying that she had  
27 lacked insurance or Medi-Cal coverage during some periods of time  
28 (A.R. 62-63). The ALJ was not required to accept this  
explanation, however. See, e.g., Gutierrez v. Astrue, 2012 WL  
1903433, at \*9 (C.D. Cal. May 25, 2012). When asked whether she  
had tried "to seek low-cost or free clinics" in 2014, Plaintiff  
claimed not to recall (A.R. 63).

1 prescribed course of treatment") (citations and quotations omitted);  
2 SSR 16-3p ("if the individual fails to follow prescribed treatment  
3 that might improve symptoms, we may find that the alleged intensity  
4 and persistence of an individual's symptoms are inconsistent with the  
5 overall evidence of record"); Rouse v. Berryhill, 2017 WL 4404402, at  
6 \*16 (D.S.C. July 6, 2017), rejected on other grounds, 2017 WL 4348560  
7 (D.S.C. Sept. 29, 2017) (court upheld ALJ's discounting of the  
8 plaintiff's testimony concerning back pain, stating, inter alia,  
9 "while pain medication was prescribed, the plaintiff declined refills,  
10 indicating her pain may not have been as severe as alleged").  
11

12 The ALJ also noted that Plaintiff sought employment during the  
13 period of alleged disability (A.R. 53). The ALJ properly could  
14 consider the fact that Plaintiff held herself out as able to work in  
15 2011 and 2012, years during which she now says she was unable to work.  
16 See Copeland v. Bowen, 861 F.2d 536, 542 (9th Cir. 1988) (upholding  
17 ALJ's rejection of claimant's credibility where claimant had accepted  
18 unemployment insurance benefits "apparently considering himself  
19 capable of work and holding himself out as available for work"); Bray  
20 v. Commissioner of Social Security Admin., 554 F.3d 1219, 1227 (9th  
21 Cir. 2009) (fact that a claimant has sought out employment weighs  
22 against a finding of disability); see also Ghanim v. Colvin, 763 F.3d  
23 at 1165 ("continued receipt" of unemployment benefits can cast doubt  
24 on a claim of disability); but see Webb v. Barnhart, 433 F.3d 683, 688  
25 (9th Cir. 2005) ("That Webb sought employment suggests no more than  
26 that he was doing his utmost, in spite of his health, to support  
27 himself").  
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1 To the extent one or more of the ALJ's stated reasons for  
2 discounting Plaintiff's credibility may have been invalid, the Court  
3 nevertheless would uphold the ALJ's credibility determination under  
4 the circumstances presented. See Carmickle v. Commissioner, 533 F.3d  
5 at 1162-63 (despite the invalidity of one or more of an ALJ's stated  
6 reasons, a court properly may uphold the ALJ's credibility  
7 determination where sufficient valid reasons have been stated). In  
8 the present case, the ALJ stated sufficient valid reasons to allow  
9 this Court to conclude that the ALJ discounted Plaintiff's credibility  
10 on permissible grounds. See Moisa v. Barnhart, 367 F.3d at 885. The  
11 Court therefore defers to the ALJ's credibility determination. See  
12 Lasich v. Astrue, 252 Fed. App'x 823, 825 (9th Cir. 2007) (court will  
13 defer to Administration's credibility determination when the proper  
14 process is used and proper reasons for the decision are provided);  
15 accord Flaten v. Secretary of Health & Human Services, 44 F.3d 1453,  
16 1464 (9th Cir. 1995).<sup>5</sup>

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25 <sup>5</sup> The Court need not and does not determine whether  
26 Plaintiff's subjective complaints are credible. Some evidence  
27 suggests that those complaints may be credible. However, it is  
28 for the Administration, and not this Court, to evaluate the  
credibility of witnesses. See Magallanes v. Bowen, 881 F.2d 747,  
750, 755-56 (9th Cir. 1989).

1 **CONCLUSION**

2  
3 For all of the foregoing reasons,<sup>6</sup> Plaintiff's motion for summary  
4 judgment is denied and Defendant's motion for summary judgment is  
5 granted.

6  
7 LET JUDGMENT BE ENTERED ACCORDINGLY.

8  
9 DATED: March 14, 2019.

10  
11 /s/  
12 CHARLES F. EICK  
13 UNITED STATES MAGISTRATE JUDGE  
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24 \_\_\_\_\_  
25 <sup>6</sup> The Court has considered and rejected each of  
26 Plaintiff's arguments. Neither Plaintiff's arguments nor the  
27 circumstances of this case show any "substantial likelihood of  
28 prejudice" resulting from any error allegedly committed by the  
Administration. See generally McLeod v. Astrue, 640 F.3d 881,  
887-88 (9th Cir. 2011) (discussing the standards applicable to  
evaluating prejudice).